

Comparative Constitutional Law: Structure and Transitions
Lewis & Clark Law School
Fall 2013

Professor Ozan Varol

Office: LRC 222

Office Hours: Drop by or by
appointment

Office Phone: (503) 768-6805

Email: ovarol@lclark.edu

Welcome to Comparative Constitutional Law: Structure and Transitions. We will meet on Mondays and Wednesdays from 5:00 pm to 6:25 pm in Legal Research Center, Room 5. The required casebook is Norman Dorsen, Michel Rosenfeld, Andras Sajó & Susanne Baer, *Comparative Constitutionalism: Cases and Materials* (2d ed. 2010).

This course explores topics in the comparative study of constitutional law, with a focus on the structure of different constitutional systems and the consequences of those structural differences. Recent constitutional reconstructions across the Middle East following the 2011 Arab Spring have called renewed attention to the structural design of political systems. In light of these recent events, this course will address the following questions: What are the basic structural elements of constitutions? How do these elements differ across time, region, and regime type? What is the process by which states draft and implement constitutions? Comparing constitutions from various regions of the world, the course will examine several topics concerning constitutional structure, including judicial review, federalism, separation of powers, presidential and parliamentary systems, constitutional transitions, and constitutional amendment processes. The course will conclude with reflections on what the comparative perspective tells us about the U.S. Constitution.

Attendance and Participation

Class attendance is mandatory. Please arrive on time as you will be expected to do as an attorney in court. To receive credit for the class, you must attend class regularly and receive a passing grade. I take attendance each day using a sign-in sheet that will be circulated at the beginning of class.

Class participation is of central importance to this class. I will call on random students each day. You are expected to come to each class prepared to discuss the reading assigned for that day. In addition, students will be asked to respond to the claims and arguments of other students and provide counter-arguments even when it is not an argument that they may necessarily support. I reserve the right to adjust your grade up or down one notch (e.g., from a “B” to a “B+” or “B-“) to take into account the quality of your class participation.

Advance Passes and Absences

I get that “life happens” and your obligations may occasionally make class preparation or attendance impossible. If you will be unprepared for class on a particular day, please email me by 12 p.m. before class using the subject “Pass Request” to request an advance pass and I will not call on you. No explanation for the pass is required or expected. If you are absent from class on a particular day, that also counts as a pass.

You are entitled to a combined total of 5 passes without penalty to your final grade. For example, you may be absent from 2 classes and request 3 advance passes, or you may request 3 advance passes and be absent from 2 classes. If the combined total of your absences and passes exceed 5, your final grade will be subject to a downward adjustment by one notch (e.g., from a “B” to a “B-“) for each additional pass or absence above the limit of 5. Sanctions (including a downward grade adjustment) may also be imposed for frequent late arrivals or for failing to inform me by 12 p.m. that you will be unprepared.

The only exceptions to the class attendance and preparation policies will be in situations where Associate Dean Martha Spence deems that an accommodation is warranted. If you would like to request an accommodation from these policies for compelling reasons, please contact Liz Hobbs (lhobbs@lclark.edu, [503-768-6648](tel:503-768-6648)) in the Associate Dean’s office.

Exams and Grading

Your grade in this class will be based on an unscheduled, open book final exam. Towards the end of the term, I will provide you with more information, and guidance, about the exam.

Contacting Me

I encourage all of you to speak to me about the class, law school, and your career, and to ask questions whenever you are unsure of something. I strongly encourage you to make an appointment to meet with me using the following link: <http://meetme.so/varol>. With varying student schedules, an online scheduling system ensures that we can find a mutually convenient time to meet. You can also email me (ovarol@lclark.edu) with short questions—even several of them—that can be easily answered in that manner. I am very fond of email and will generally respond to email messages received during the week within 24 hours. I rarely check my email over the weekend and will respond on Monday to any questions I receive over the weekend.

If you have a Twitter account, you may also follow me on Twitter (@ProfessorVarol). I regularly post commentary or news articles on subjects relating to constitutional law, comparative constitutional law, and Middle Eastern law and politics.

Policy on Internet and Cell Phone Use

Please turn your cell phone off during class. If you have a good reason to keep it on (e.g., child care, family illness, or the like), please notify me. I also expect that, although many of you will use laptops to take notes, you will not use them to access the Internet during class unless I instruct you to do so for a class-related purpose. That means no emailing, texting, Facebooking, surfing, or comparably distracting extracurricular activities.

Recording Classes

You are not allowed to use your laptops to record classes. Each class will, however, be recorded by the law school. If you miss class, please email my assistant Sue Page (spage@lclark.edu) to request a copy of the class recording. No explanation for your absence is necessary or expected. You are allowed to request the recordings of up to three classes. The only exceptions to this policy will be in situations where Associate Dean Martha Spence deems that an accommodation is warranted. If you would like to request an accommodation for compelling reasons, please contact Liz Hobbs (lhobbs@lclark.edu, 503-768-6648) in the Associate Dean's office.

Course Outline & Assignment

Below is the list of your initial assignments. The “Assignment” for each class is listed under the date on which it is due. Please check your Lewis & Clark email at least twice a week because I will email the class to adjust assignments and make clarifications. You are responsible for knowing whatever I say in class, as well as for all information emailed to the class or posted on TWEN. The in-class PowerPoint presentations will be posted on TWEN following each class.

Please note that the outline below covers only the first ten classes. I will distribute subsequent assignments at the appropriate time. I have elected to proceed in this manner, rather than publishing a fixed schedule of assignments for the entire semester, both to retain flexibility regarding the substantive materials to be covered in the class, given the quickly evolving constitutional-design processes currently in progress, and to avoid assigning material that we may be unable to cover in class.

There will be no class on Monday, October 29th, and Wednesday, October 31st. I will schedule make-up classes in consultation with the students later in the semester.

WHAT IS COMPARATIVE CONSTITUTIONAL LAW?

Class # 1

- Topics
 - Why comparative constitutional law?
 - Constitutional models: written versus unwritten constitutions
- Assignment
 - Sign up for class website on The West Educational Network (TWEN)
 - The syllabus (available on TWEN)
 - Read the U.S. Constitution (any copy will do) and the 2012 Egyptian Constitution (available on TWEN—please read the Preamble, Part I (Elements of State and Society), and Part II (Rights and Freedoms), and skim the rest). Compare the two constitutions and take note of any remarkable similarities and differences.
 - Casebook, pp. 1–6, 55–63

CREATING AND REVISING CONSTITUTIONS

Class # 2

- Topics
 - Constitutional models: Major types of contemporary constitutional systems
 - Constitutional models: Constitutions beyond the nation–state
- Assignment
 - Casebook, pp. 63–90

Class # 3

- Topics
 - Constitutional models: Constitutions beyond the nation–state

- Assignment
 - Casebook, pp. 90–116

Classes # 4 & 5

- Topics
 - The birth, alteration, and revision of the constitution
 - Constitution-making in the aftermath of the Arab Spring
- Assignment (please read these in the order listed below)
 - Casebook, pp. 116–129
 - U.S. Declaration of Independence (any copy will do)
 - Handouts on Egypt (TWEN)
 - Handouts on Tunisia (TWEN)

Class # 6

- Topics
 - Amending or replacing the constitution
- Assignment
 - Casebook, pp. 130–138
 - Kim Lane Scheppele, Not Your Father’s Authoritarianism: The Creation of the “Frankenstate” (TWEN)
 - David Landau, Abusive Constitutionalism, pp. 1–23, <http://ssrn.com/abstract=2244629>

JUDICIAL ENFORCEMENT OF THE CONSTITUTION

Class # 7

- Topics
 - The place of constitutional adjudication

- Principal models of constitutional adjudication
- Assignment
 - Casebook, pp. 139–165

Class # 8

- Topics
 - Principal models of constitutional adjudication
 - Constitutional interpretation
- Assignment
 - Casebook, pp. 165–171; 190–198
 - Ran Hirschl, Juristocracy (TWEN).

Class # 9

- Topics
 - Constitutional interpretation
- Assignment
 - Casebook, pp. 198–219

Class # 10

- Topics
 - Constitutional interpretation
 - Global judicial dialogue
- Assignment
 - Casebook, pp. 219–226; pp. 18–36

SEPARATION OF POWERS

Class # 11

- Topics

- Presidentialism and Parliamentarism
- The Legislative Branch
- Assignment
- Casebook, pp. 240–265
- Bruce Ackerman, To Save Egypt, Drop the Presidency (TWEN)

Class # 11

- Topics
- The Legislative Branch
- Assignment
- Casebook, pp. 284–304

Class # 12

- Topics
- Executive power
- Assignment
- Casebook, pp. 305–332

Class # 13

- Topics
- Executive power
- Assignment
- Casebook, pp. 332–360

Class # 14

- Topics
- The judiciary
- Assignment

- Casebook, pp. 361–383

FEDERALISM

Class # 15

- Topics
 - Federalism's various forms
- Assignment
 - Casebook, pp. 384–409

Class # 16

- Topics
 - Federalism's various forms
- Assignment
 - Casebook, pp. 410–428

Class # 17

- Topics
 - Decentralization in Nonfederal States
 - Confrontation Between the Federation and the Federated Governments
- Assignment
 - Casebook, pp. 429–449

Class # 18

- Topics
 - Confrontation Between the Federation and the Federated Governments
- Assignment
 - Casebook, pp. 449–481

Class # 19

- Topics
 - Confrontation Between the Federation and the Federated Governments
- Assignment
 - Casebook, pp. 481–507

Class # 20

- Topics
 - Confrontation Between the Federation and the Federated Governments
- Assignment
 - Casebook, pp. 507–526

CONSTITUTIONAL GUARANTEES OF DEMOCRACY

Class # 21

- Topics
 - Democracy and Law
- Assignment
 - Casebook, pp. 1414–1436

Class # 22

- Topics
 - Political Parties
- Assignment
 - Casebook, pp. 1485–1510

STATES OF EMERGENCY, COMBATING TERRORISM, AND THE BOUNDS OF THE CONSTITUTION

Class # 23

- Topics

- Emergencies, Crises, and Combating Global Terrorism
- Assignment
 - Casebook, pp. 1511–1539

Class # 24

- Topics
 - State of Emergency Jurisprudence
- Assignment
 - Casebook, pp. 1539–1557

Class # 25

- Topics
 - Combating Terrorism: War or Criminal Enforcement?
- Assignment
 - Casebook, pp. 1565–1584; notes 2, 3, and 4 on pp. 1599–1601.

CONCLUSION

Class # 26

- Topics
 - Reflections on the U.S. Constitution
- Assignment
 - Law & Versteeg, The Declining Influence of the U.S. Constitution, <http://ssrn.com/abstract=1923556>
(only read the Introduction, Part III, and Conclusion)